



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

JUL 18 2007

Brian Svoboda, Esq.
Perkins Coie, LLP
607 14th Street, NW, 8th Floor
Washington, DC 20005

RE: MUR 5870
Alan Mollohan;
Alan Mollohan for Congress Committee
and Richard S. Pizatella, in his official
capacity as treasurer

Dear Mr. Svoboda:

On November 6, 2006, the Federal Election Commission notified your clients of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 13, 2007, the Commission found, on the basis of the information in the complaint, information provided by your clients, and publicly available information, that there is no reason to believe Alan Mollohan, Alan Mollohan for Congress Committee and Richard S. Pizatella, in his official capacity as treasurer, violated 2 U.S.C. § 441a. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Lynn Tran, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: ~~West Virginia Values, LLC;~~
Alan Mollohan for Congress Committee
and Richard S. Pizatella, in his official
capacity as treasurer; and Alan Mollohan

MUR: 5870

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by William Holley. *See* 2 U.S.C. § 437g(a)(1). Based on the complaint, responses, and other available information, there is no reason to believe that West Virginia Values, LLC violated 2 U.S.C. § 441a by making excessive in-kind contributions in the form of coordinated communications and that Alan Mollohan, Alan Mollohan for Congress Committee and Richard Pizatella, in his official capacity as treasurer, violated 2 U.S.C. § 441a by knowingly accepting excessive in-kind contributions in the form of coordinated communications.

II. FACTS

Alan Mollohan is a member of the U.S. House of Representatives from West Virginia's First Congressional District. The Mollohan Committee is Rep. Mollohan's principal campaign committee.

West Virginia Values, a limited liability company organized under Section 527 of the Internal Revenue Code, was established on April 14, 2005, listing its purpose as "[t]o educate and motivate the public on issues and public officials relating to the values and well-being of the people of West Virginia." Form 8871, filed April 14, 2005. West Virginia Values lists three members, Joseph W. Powell, R. Lane Bailey and George Carenbauer. Jeffrey Burum was the

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principal contributor to West Virginia Values during the 2006 election cycle, contributing \$75,000, or approximately 75% of the contributions received by West Virginia Values in 2006.

See id.

West Virginia Values spent \$75,000 for two television advertisements, "Stolen Valor" and "Setting the Record Straight," that ran in West Virginia in October 2006 and were timely reported as electioneering communications. *See* FEC Form 9s (Electioneering Communications), filed on October 12, 2006 and October 16, 2006. Both advertisements used testimonials from West Virginia veterans to argue that Rep. Mollohan's opponent, Chris Wakim, lied about his military record and question Wakim's character and fitness for office. "Stolen Valor" stated that Wakim had "stolen the valor of others" and argued that "if he lies about his military record, we can't really trust him on anything." *See* "Stolen Valor" available at www.wvvalues.org (last visited May 23, 2007). "Setting the Record Straight" also argued that Wakim "lied about his actions in the Gulf War" and concluded "if Wakim will lie about being a Persian Gulf War veteran, he'll lie about anything else." *See* "Setting the Record Straight" available at www.wvvalues.org (last visited May 23, 2007).

The complaint alleges that the television advertisements run by West Virginia Values constitute coordinated communications under 11 C.F.R. § 109.21 since the ads were paid for by West Virginia Values, satisfy the content standard because they are electioneering communications and public communications, and satisfy the conduct standard because of the purported relationship between Jeffrey Burum, the primary donor to West Virginia Values, and Alan Mollohan. Specifically, the complaint notes that Burum's company has received \$31 million in earmarks through Mollohan over the last five years, Burum sits on the board of Vandalia Heritage, a non-profit organization that has received \$28 million in earmarks through

Mollohan over the last five years, and Burum and his corporation have donated in excess of \$20,000 to Mollohan's political committees and family foundation since 2002. The complaint states that "[i]t is probable, in light of the long relationship and vast sums of money that Mollohan has directed to Burum's organizations (and vice versa), that coordination has occurred." Complaint at 2.

The amended complaint argued that Burum had a vested interest in Mollohan's success and attached news articles in which the campaign manager for Mollohan was quoted as stating that Mollohan had communicated with Burum but not about West Virginia Values, to support its conclusion that "it was implausible that Burum and Mollohan did not discuss aspects of the campaign that were material to the creation of the advertisements during the admitted conversations." Amended Complaint at 1.

West Virginia Values and the Mollohan Committee submitted separate responses denying the allegations. West Virginia Values also submitted signed, sworn affidavits from its three members stating that all decisions relating to West Virginia Values' advertising campaign were made entirely by the members of West Virginia Values without any discussions with Mollohan or the Mollohan Committee. *See* Affidavit of R. Lane Bailey ¶ 3-4 ("Bailey Affidavit"); Affidavit of George Carenbauer ¶ 4-5 ("Carenbauer Affidavit"); Affidavit of Joseph W. Powell ¶ 3-4 ("Powell Affidavit"). The affidavit from R. Lane Bailey also stated that Burum did not participate in or control the content or distribution of the ads run by West Virginia Values and that the contribution from Burum to West Virginia Values was unsolicited and was not earmarked for any specific purpose. *See* Bailey Affidavit ¶ 6-7. The two other members of West Virginia Values stated that they did not have any discussions or contact with Burum. *See* Carenbauer Affidavit ¶ 7, Powell Affidavit ¶ 6. The Mollohan Committee further argues that the

complaint is purely speculative and does not allege any facts to satisfy the conduct prong of the Commission's coordination regulations. Mollohan Committee Response at 2.

III. ANALYSIS

Under the Federal Election Campaign Act, as amended (the "Act"), an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or party committee constitutes an in-kind contribution. *See* 2 U.S.C. § 441a(a)(7)(B)(i) and (ii). The regulations that implement these statutory provisions define "coordinated" and prescribe the treatment of a "coordinated" expenditure as an in-kind contribution. *See* 11 C.F.R. § 109.20(a) and (b). The regulations also specify that a payment for a coordinated communication is made for the purpose of influencing a federal election, constitutes an in-kind contribution to the candidate or committee with whom or which it is coordinated, and must be reported as an expenditure made by that candidate or committee. 11 C.F.R. § 109.21(b)(1).

To determine whether a communication is coordinated, 11 C.F.R. § 109.21 sets forth a three-pronged test: (1) the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing; (2) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. *See* 11 C.F.R. § 109.21(a).

The content standards include: (1) an "electioneering communication"; (2) a "public communication" that disseminates campaign materials prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; and (4) certain "public communications," distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party). 11 C.F.R.

§ 109.21(c).

Any one of six conduct standards will satisfy the third element of the coordination test, “whether or not there is agreement or formal collaboration.” 11 C.F.R. § 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the “request or suggestion” of the relevant candidate or committee; (2) communications made with the “material involvement” of the relevant candidate or committee; (3) communications made after one or more “substantial discussions” between the person paying for the communication and the relevant candidate or committee; (4) specific actions of a “common vendor”; (5) specific actions of a “former employee”; and (6) specific actions relating to the dissemination of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

The television advertisements paid for by West Virginia Values satisfy the first two prongs of the coordinated communications test. The first prong of the coordinated communications test is satisfied because West Virginia Values – the entity that paid for the communications at issue – is a “person other than [the] candidate, authorized committee, political party committee, or agent of any of the foregoing.” 11 C.F.R. § 109.21(a)(1). The second prong, the content standard, is satisfied because the television advertisements are electioneering communications under 11 C.F.R. § 100.29(c)(1). The advertisements would also meet the content standard because they are “public communications” that refer to a clearly identified House candidate, Chris Wakim, distributed in the candidate’s jurisdiction within 90 days of the general election. *See* 11 C.F.R. § 109.21(c)(4)(i).

The complaint, however, initially failed to allege which conduct standard is satisfied, alleging only that it is “probable” that coordination occurred between West Virginia Values and the Committee based on the long-standing relationship between the primary donor to West

Virginia Values, Jeffrey Burum, and Alan Mollohan. The amended complaint referenced statements from Mollohan's campaign spokesman that Mollohan communicated with Burum, but that they did not discuss the activities of West Virginia Values, LLC, to support its claim that there were "substantial discussions" between Mollohan and Burum sufficient to meet the requirements of 11 C.F.R. § 109.21(d)(3), noting that it was "implausible" that Burum and Mollohan did not discuss the West Virginia Values advertisements.

The information in the complaint and the amended complaint does not appear to be sufficient to demonstrate that West Virginia Values satisfied the conduct prong of the coordinated communications test; complainant does not allege that any member of West Virginia Values, or any of its employees or agents, had communications with the Mollohan Committee sufficient to meet the "substantial discussions" standard. The only information comes from the affidavits submitted by West Virginia Values specifically denying that any such discussions occurred. In light of the speculative nature of the allegations and the sworn statements specifically denying the elements necessary to satisfy the conduct standard, there is no support for finding that there were substantial discussions between West Virginia Values, the group paying for the communication, and any employee or agent of the Mollohan Committee.

The complaint has not alleged, and we have not found, any connection between West Virginia Values, the Mollohan Committee or Burum that would satisfy any of the other conduct standards. The denials by the Mollohan Committee and West Virginia Values would also apply to the "request or suggestion" or "material involvement" conduct standards. A review of the relevant reports filed by the Mollohan Committee and West Virginia Values does not reveal a "common vendor" used for television advertisements, nor is there any allegation that Burum meets the "former employee or independent contractor" requirements. Finally, there is no

allegation that the communications involved specific actions relating to the dissemination of campaign material.

Therefore, the Commission found that there is no reason to believe that West Virginia Values, LLC violated 2 U.S.C. § 441a by making excessive in-kind contributions in the form of coordinated communications. The Commission also found that there is no reason to believe that Alan Mollohan, Alan Mollohan for Congress Committee and Richard Pizatella, in his official capacity as treasurer, violated 2 U.S.C. § 441a by knowingly accepting excessive in-kind contributions in the form of coordinated communications.

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